

OPEN SESSION AGENDA ITEM

54-121.2 SEPTEMBER 2018 REGULATION AND DISCIPLINE COMMITTEE ITEM II.A.2

DATE: September 13, 2018

TO: **Members, Regulation and Discipline Committee**
Members, Board of Trustees

FROM: Melanie J. Lawrence, Interim Chief Trial Counsel, Office of Chief Trial Counsel

SUBJECT: Rule Regarding Judicial Notice of Court Records (Rule 5.104(H), Rules Proc. of State Bar) – Return From Public Comment and Request for Approval

EXECUTIVE SUMMARY

This proposal would amend the Rules of Procedure to allow the State Bar Court to take judicial notice of non-certified court records, thereby saving State Bar Court litigants unnecessary, and significant, effort and expense.

At the May 2018 meeting, in Item III.A.2., the Regulation and Discipline Committee resolved to send out for public comment the proposed amendments to the rule regarding Judicial Notice. The close of public comment was July 31st. One public comment was received during the 60-day public comment period. The public comment received was in support of the proposal. The public comment is reproduced in Attachment C.

BACKGROUND

Under current law, it is unclear whether the State Bar Court must require certified court records in order to take judicial notice of the records of other courts. While parties generally stipulate to the authenticity of uncertified records, the uncertainty of whether a stipulation will be forthcoming, combined with the delay in securing certified records, requires parties to obtain certified court records for presentation to the State Bar Court. As a result, the Office of Chief Trial Counsel, and proffering respondents, expend significant time and resources.

DISCUSSION

Rule 5.104, Rules of Procedure of the State Bar, sets forth the evidentiary rules applicable in State Bar proceedings. Rule 5.104(C), quoted below, sets out the somewhat relaxed admissibility standard of California administrative and licensing proceedings:

(C) Relevant and Reliable Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule

which might make improper the admission of the evidence over objection in civil actions.

Nonetheless, it remains unclear whether the State Bar Court must require certified court records in order to take judicial notice of the court records. While parties generally stipulate to the authenticity of uncertified records, in some cases, no stipulation is reached even when there is no legitimate dispute concerning authenticity. For this reason, as part of the investigation process, the Office of Chief Trial Counsel (OCTC) customarily obtains certified court records for presentation to the State Bar Court. This is expensive because the court clerks charge for certification services and because the State Bar has to employ runners to obtain the documents. This process also delays OCTC's completion of investigations (because court clerks are often backlogged with other tasks) and unnecessarily utilizes staff time.

Therefore, OCTC proposes that rule 5.104 be amended to expressly authorize the State Bar Court to take judicial notice of uncertified court records. In a State Bar Court proceeding, there should rarely if ever be a genuine dispute about the authenticity of a State Bar Court record or a California Supreme Court disciplinary order. Legitimate authenticity issues sometimes arise with respect to records from other courts. Therefore, the proposed rule would require the parties to provide advance notice to each other of their intention to use uncertified records from outside courts. This way, in the rare circumstance that there is bona fide dispute concerning the authenticity of such a record, the parties will have an opportunity to settle the matter among themselves or submit the issue for decision by the State Bar Court.

Language similar to this proposal was vetted before the Bench/Bar Committee, chaired by the Honorable Donald Miles, Supervising Judge of the State Bar Court Hearing Department. The attendees, including members of the respondents' bar, did not voice a substantive objection to this proposal. Thereafter, the proposal was modified. The currently proposed language would establish a procedure for mandatory judicial notice of court records that are relevant to the proceeding.

The initial proposal was submitted prior to Board of Trustee approval of amendment of the rules regarding letters of inquiry. Subparagraph (G) of rule 5.104 was added as a result of the rule amendments regarding letters of inquiry. As a result, while this proposal was initially circulated for public comment as amending rule 5.104 to add a subparagraph (G) regarding Judicial Notice, it has now been renumbered to subparagraph (H). No substantive changes have been made to the proposal.

FISCAL/PERSONNEL IMPACT

Financial and resource savings due to reduced time and cost of securing uncertified court records.

RULE AMENDMENTS

Title 5, Division 2, Chapter 1, Rule 5.104, Rules of Procedure of the State Bar

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

RECOMMENDATION

It is recommended that the Board of Trustees approve the following resolution:

RESOLVED, that following a 60-day public comment period, the Board of Trustees hereby adopts the amendments to the rules of Procedure of the State Bar, as set forth in Attachment A; and it is

FURTHER RESOLVED, that the amendment to rule 5.104 of the Rules of Procedure of the State Bar is effective immediately and will apply to all pending and future matters.

ATTACHMENT(S) LIST

- A.** Proposed amended rule 5.104 (Clean Version)
- B.** Proposed amended rule 5.104 (Redline Version)
- C.** Public comment on proposed amended rule 5.104

ATTACHMENT A (Clean Version of New Rule 5.104)

Rule 5.104 Evidence (Rules of Procedure of the State Bar)

- (A) Oral Evidence. Oral evidence must be taken only on oath or affirmation.
- (B) Rights of Parties. Each party will have these rights:
- (1) to call and examine witnesses;
 - (2) to introduce exhibits;
 - (3) to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination;
 - (4) to impeach any witness regardless of which party first called him or her to testify;
 - (5) to rebut the evidence against him or her; and,
 - (6) if the member does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination.
- (C) Relevant and Reliable Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.
- (D) Hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.
- (E) Privileges. The rules of privilege will be effective to the extent that they are otherwise required by statute to be recognized at the hearing.
- (F) Judicial Discretion. The hearing judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.
- (G) Letters of Inquiry.
- (1) Proof that the Office of Chief Trial Counsel sent an e-mail notification to a member in compliance with rule 2409(a), Rules of Procedure of the State Bar, coupled with proof that the e-mail was not returned as undeliverable, creates a presumption affecting the burden of producing evidence that the member viewed the e-mail on or about the date it was sent.
 - (2) Proof that a letter of inquiry was remotely accessed on a member's "My State Bar Profile" on a given date creates a presumption affecting the burden of producing evidence that the member received the letter of inquiry on that date.
 - (3) The Office of Chief Trial Counsel may establish the proof necessary under paragraphs (i) and (ii) by submitting copies of State Bar records, supported by declaration(s) of State Bar staff attesting to the authenticity and nature of the records.
- (H) Judicial Notice of Court Records and Public Records.
- (1) For purposes of this rule, "court records" means pleadings, declarations, attachments, dockets, reporter's transcripts, clerk's transcripts, minutes, orders, and opinions that have been filed with the clerk of any tribunal or court within the United States.

- (2) The State Bar Court may take judicial notice of the following:
- (a) court records that have been certified by the clerk of the court or tribunal;
 - (b) non-certified court records of the State Bar Court;
 - (c) non-certified orders of the California Supreme Court in attorney disciplinary cases;
 - (d) non-certified court records that have been copied from the tribunal or court's official file and timely provided to the opposing party during the course of formal or informal discovery. The party offering such records must provide a declaration stating the date on which the documents were copied and certifying that the documents presented to the State Bar Court are an accurate copy of the court records obtained from the court's official file; and
 - (e) non-certified court records that have been copied from a public access website operated by a court or government agency for the purpose of posting official public records or court records, e.g., the federal court website called "Public Access to Court Electronic Records" and more commonly known as PACER. The party offering such records must provide a declaration stating the date on which the documents were copied and certifying that the documents presented to the State Bar Court are an accurate copy of the court records obtained from the website.
- (3) The State Bar Court must take judicial notice of the records mentioned in paragraph (2) if they are relevant to the proceeding unless a party proves, e.g., through certified records, that the proffered records are incomplete or not authentic.
- (4) This rule is not intended to limit the judicial notice provisions contained in Evidence Code, section 450 et seq.

ATTACHMENT B (Redline Version of New Rule 5.104)

Rule 5.104 Evidence (Rules of Procedure of the State Bar)

(A) Oral Evidence. Oral evidence must be taken only on oath or affirmation.

(B) Rights of Parties. Each party will have these rights:

- (1) to call and examine witnesses;
- (2) to introduce exhibits;
- (3) to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination;
- (4) to impeach any witness regardless of which party first called him or her to testify;
- (5) to rebut the evidence against him or her; and,
- (6) if the member does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination.

(C) Relevant and Reliable Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(D) Hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(E) Privileges. The rules of privilege will be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(F) Judicial Discretion. The hearing judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

(G) Letters of Inquiry.

- (1) Proof that the Office of Chief Trial Counsel sent an e-mail notification to a member in compliance with rule 2409(a), Rules of Procedure of the State Bar, coupled with proof that the e-mail was not returned as undeliverable, creates a presumption affecting the burden of producing evidence that the member viewed the e-mail on or about the date it was sent.
- (2) Proof that a letter of inquiry was remotely accessed on a member's "My State Bar Profile" on a given date creates a presumption affecting the burden of producing evidence that the member received the letter of inquiry on that date.
- (3) The Office of Chief Trial Counsel may establish the proof necessary under paragraphs (i) and (ii) by submitting copies of State Bar records, supported by declaration(s) of State Bar staff attesting to the authenticity and nature of the records.

(H) Judicial Notice of Court Records and Public Records.

- (1) For purposes of this rule, "court records" means pleadings, declarations, attachments, dockets, reporter's transcripts, clerk's transcripts, minutes, orders, and opinions that have been filed with the clerk of any tribunal or court within the United States.

- (2) The State Bar Court may take judicial notice of the following:
- (a) court records that have been certified by the clerk of the court or tribunal;
 - (b) non-certified court records of the State Bar Court;
 - (c) non-certified orders of the California Supreme Court in attorney disciplinary cases;
 - (d) non-certified court records that have been copied from the tribunal or court's official file and timely provided to the opposing party during the course of formal or informal discovery. The party offering such records must provide a declaration stating the date on which the documents were copied and certifying that the documents presented to the State Bar Court are an accurate copy of the court records obtained from the court's official file; and
 - (e) non-certified court records that have been copied from a public access website operated by a court or government agency for the purpose of posting official public records or court records, e.g., the federal court website called "Public Access to Court Electronic Records" and more commonly known as PACER. The party offering such records must provide a declaration stating the date on which the documents were copied and certifying that the documents presented to the State Bar Court are an accurate copy of the court records obtained from the website.
- (3) The State Bar Court must take judicial notice of the records mentioned in paragraph (2) if they are relevant to the proceeding unless a party proves, e.g., through certified records, that the proffered records are incomplete or not authentic.
- (4) This rule is not intended to limit the judicial notice provisions contained in Evidence Code, section 450 et seq.

ATTACHMENT C (Public Comment)

Maurice M. II – emailed comment – May 25, 2018

"I support the proposed rule change re: judicial notice, provided the party submitting the proposed uncertified records provides the proper foundation through a declaration. The foundation requirement can be satisfied by a declaration stating how the uncertified copy was obtained.

I have seen purported "copies of court records" manufactured by unscrupulous private attorneys that appeared to bear filing stamps from California courts, but were in actuality fraudulent documents, with fraudulent stamps. In this day and age, it is even easier to photoshop a filing stamp."